

In the concluding paragraph of the preface to the 13th edition of this work, the present editor requested the attention of the public, to the circumstances, under which, he engaged in it. With a renewal of the same request, he now presents the reader with the following *Attempt to complete Mr. Hargrave's Annotation on Feuds*, at the beginning of the Second Book. In doing this, he will endeavour,

- I. To give a succinct account of the different nations, by whom they were established :
- II. A succinct account of their nature, and particularly of those peculiar marks and qualities, which distinguish them from other laws :
- III. Some account of the principal written documents, which are the sources, from which, the learning respecting them, is derived :
- IV. Some account of the principal events, in the early history of the feuds of foreign countries :
- V. And an historical view of the revolutions of the feud in England.

But as his researches are intended merely by way of supplemental annotation on Littleton, and as the work of that author treats of real property only, his observations will be principally directed, through every branch of his inquiry, to the influence of the feudal law, on that species of property. But this, he means, should be particularly the case, when he treats of the feudal jurisprudence of England. Under that head, he will offer some general observations,

(1st,) On the time, when feuds may be supposed to have been first established in England; (2dly,) On the fruits and incidents of the feudal tenure; and, (3dly,) On the feudal polity of this country, with respect to the inheritance and alienation of land: Under this head he will attempt to state the principal points of difference between the Roman, and the feudal jurisprudence, in the articles of heirship, (4thly,) the order of succession, and, (5thly,) the absolute and unqualified property of the subject of the civil law, and the limited and qualified property of the feudal tenant, in their respective possessions. (6thly,) He will then attempt to shew the means, by which some of the general restraints upon the alienation of real property, introduced by the feud, have been removed; (7thly,) He will treat of entails. (8thly,) He will endeavour to shew the means by which the restraints created by entails were eluded or removed. Having thus treated of that species of alienation, which, being the act of the party himself, is termed voluntary alienation; (9thly,) he will afterwards treat of that species of alienation, which, being forced on the party, is termed involuntary. Under this head he will briefly consider the attachment of lands for debt; first, in regard to its effect upon them, while they continue in the possession of the party himself; then, in regard to its effect upon them, when in the possession of the heir or devisee; and afterwards, in regard to the prerogative remedies for the recovery of crown debts. (10thly,) He will then offer some observations on testamentary alienation; and, (11thly,) conclude by a detail of some of the principal circumstances in the history of the decline and fall of the feud in this country.

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I. THE

BRITANNICVM

I. THE FEUDAL LAW WAS ESTABLISHED by those nations who overturned the Roman empire. The first of these were the Vandals, the Suevi, and the Alani. They inhabited the countries bordering on the Baltic. About the year 406, they made an irruption into Gaul; from Gaul, they advanced into Spain; about the year 415, they were driven from Spain by the Visigoths, and invaded Africa, where they formed a kingdom. About the year 431, the Franks, the Allemanni, and the Burgundians penetrated into Gaul. Of these nations, the Franks became the most powerful; and having either subdued or expelled the others, made themselves masters of the whole of those extensive provinces, which, from them, received the name of France. Pannonia and Illyricum, were conquered by the Huns: Rhætia, Noricum and Vindelicia, by the Ostrogoths; and these were, sometime after, conquered by the Franks. In 449, the Saxons invaded Great Britain. The Herulians marched into Italy, under the command of their king Odoacre, and in 476, overturned the empire of the West. From Italy, in 493, they were expelled by the Ostrogoths. About the year 568, the Lombards issuing from the Mark of Brandenburg, invaded the Higher Italy, and founded an empire, called the kingdom of the Lombards. After this, little remained in Europe of the Roman empire, besides the Middle and Inferior Italy. These, on the final division of that empire, between the sons of Theodosius, in 395, had fallen to the share of the emperor of the East, who governed them by an officer called the exarch, whose residence was fixed at Ravenna, and by some subordinate officers, called dukes. In 743, the exarchate of Ravenna, and all the remaining possessions of the emperor in Italy, were conquered by the Lombards. This, as it was the final extinction of the Roman empire in Europe, was the completion, in that quarter of the globe, of those conquests which established the law of the feud.

The nations, by whom these conquests were made, came, it is evident, from different countries, at different periods, spoke different languages, and were under the command of separate leaders; yet they appear to have established, in almost every state, where their polity prevailed, nearly the same system of laws. This system is known by the *appellation of the feudal law*.

II. Sir Henry Spelman, after Cujas, defines a fief to be, "A right, which the vassal hath in land, or some immoveable thing of his lord's, to use the same, and take the profits thereof, hereditarily, rendering unto his lord such feudal duties and services, as belong to military tenure; the mere propriety of the soil always remaining to the lord." This definition appears accurate and comprehensive: and an analysis of it may point out those PECULIAR AND CHARACTERISTIC MARKS, WHICH DISTINGUISH THE FEUDAL LAW FROM EVERY OTHER LAW. 1st, Where the soil, and the right to the profits of the soil, meet in the same person, he may be said to have an absolute and unmixed estate in his lands. This absolute and unmixed estate, the subject of every kingdom, not governed by the feudal polity, so far as respects the relation between sovereign and subject, appears to possess. But, by the feudal law, with respect to the relation between the sovereign and the subject, the right to the soil and the right to the profits of the soil, were separate; the tenant being invested with the latter, the sovereign continuing to be intitled to the former.

mer. This right to the profits was of the most extensive nature; it gave the tenant, except for the purpose of alienation, the complete power or dominion over the land, during the term of his tenure. Thus his estate and interest, as to the right of ownership, far exceeded that of the usufructuary in the civil law, to which it has sometimes been compared, as the usufructuary had a mere right to the ordinary profits of the usufruct, and was not permitted to make any change in it, even for its amelioration. It approached nearer to the estate of the *emphyteuta*, in the same law, as the *dominium directum* was absolutely vested in him. It approached, perhaps, still nearer to the estate of a *cestuy que trust* in our law, which has been termed a feudal idea, grafted on Roman jurisprudence. The precise nature of it, is no where, perhaps, better explained, than in lord Stair's Institutes. "It is," says his lordship, "essential to a fee, and common to all kinds thereof, that there must remain a right in the superior, which is called *Dominium directum*, and withal a right in the vassal, called *Dominium utile*: the reason of this distinction, and terms thereof, is, because it can hardly be determined, that the right of property is either in the superior or vassal alone, so that the other should only have a servitude upon it; though some have thought superiority but a servitude, to wit, the perpetual use and fruit; yet the conciliation and satisfaction of both, have been well found out in this distinction, whereby neither's interest is called a servitude; but by the resemblance of this distinction in law between *jura et actiones directæ*, and those, which for resemblance, were reductive thereto, and therefore called *utiles*, the superior's right is called *Dominium directum*, and the vassal's *Dominium utile*, and without these the right cannot consist." This right in the vassal to the use and profits of the land, while the direct dominion of the land remained in the lord, was, with respect to the relation between the sovereign and the subject, a new and original point of connection, and one of those marks which distinguish the feudal, from every other law.—2. Another of these marks, is, that, immoveable or real property only, was admitted to be held in feudality, or in other words, to be the substance of a fief. Wherever the conquerors, we speak of, established themselves, they seized, whatever they desired, of the property of the conquered, and the general allotted it to the superior officers of the army, and these again divided it, in smaller parcels, among the inferior officers. The moveable, as well as the immoveable, property of the conquered, was seized and divided by the conquerors; but moveable property, from its fluctuating and perishable nature, was ill calculated to serve, either as the sign, or the subject, of a permanent connection. This was particularly the case in those days, when it had in no point of view acquired, or was considered susceptible of, those artificial modifications, or other durable qualities, in the intendment of law, which it now possesses. Land, therefore, or immoveable property, alone, became the subject of feudal tenure. As the notions of men respecting property increased, the modifications of it were also multiplied, and all of them were considered as susceptible of feudality. Thus every species of right or servitude, to which land is subject, was given in fee. At an early period of the feudal law, we find mention of fiefs *de camera* and *cavena*. The former, was a pension granted by the lord to be paid out of his treasury; the latter, was a quantity of corn, or other grain, granted by the lord, to be delivered out of his granary. In progress of time, money charged

upon land was, in some countries, held to be feudal; and even mere money was, at last, in some countries, held by the feudal obligation, and treated as a fief. Whether money thus held, be, strictly speaking, a fief, has been the subject of much discussion. Thomasius, whose writings, in the course of this enquiry, have been found highly valuable, treats a pecuniary feud as a chimera, and seems inclined to doubt its existence. Sir Thomas Craig thus expresses himself, on this question. “The *dominium directum* of a fief must necessarily remain in the lord; the *dominium utile*, must necessarily be granted to the feudatory. When the *dominium utile* of a moveable is granted, the profits of it must necessarily belong to the usufructuary. But the profits of a moveable proceed from the use which is made of it. Now the use which is made of a moveable, either consumes it or not. In the first case, the fief is necessarily extinguished; for it is impossible that a moveable in continual use, should not, by that very use of it, be consumed, and the lord thereby deprived of it, without any fault on his part, against his will, and even without his knowledge. But if the moveable be not consumed by use, but may be preserved, the vassal has no profit from it. I know many writers of great authority hold, that there may be a fief of moveables, by way of analogy to an usufruct of those things, which are consumed by use, where the fruit and the profits belong to the vassal, the propriety remains with the lord. But in this case, the propriety, (to use the expression,) is not of the individual thing, but of a thing of the same genus or species. And therefore Cujas justly observes, that, properly speaking, these are not fiefs. For natural reason cannot be altered by civil power. We are therefore of opinion, that there cannot be a fief, though there may be a *quasi* fief of a moveable. But even a *quasi* fief is not allowed by the law of Scotland. For though stipulations are frequent amongst us, that, for the use of money, a certain yearly sum, or a certain quantity of grain be allowed; yet this should not be honored with the name of fief, as he to whom the payment is to be made, can never be said to die seised of the fee of that money.” But at the first establishment of fiefs, land or immoveable property, in the narrowest sense of that word, was the subject of a fief. That, this species of property, to the utter exclusion of every species of moveables, should be a point of connection between the sovereign and the subject, is another distinctive mark of feudality. To this it is owing, that while in this country, and in every other country whose jurisprudence is of a feudal extraction, the difference between real and personal, or immoveable and moveable property, is so strongly marked, and the legal qualities and incidents of the two species of property, are, in so many important consequences, utterly dissimilar, the distinction between them in the civil law, except in the term of prescription, is seldom discoverable.—3. The remaining point of difference between the feudal polity and the polity of other states is, the nature of the relation between the chief and the vassals. This is particularly distinguishable by six circumstances: 1stly, The relation between them was purely of a military nature; 2dly, Behind the sovereign and his immediate feudatories, there followed a numerous train of arrere vassals or sub-feudatories, between whom and the first or immediate feudatory, there subsisted a relation nearly similar to that between him and the first or chief lord; 3dly, This relation was territorial, and was not considered to arise from the general allegiance

legiance due from a subject to a sovereign, but from an implied obligation supposed to be annexed to the tenure of the fee; 4thly, The right of administering justice was an appendage of this military relation, and originally commensurate to it in its territorial extent; 5thly, The lord was not allowed to alien the fee without his tenant's consent, nor the tenant, without the consent of his lord; and 6thly, Though in point of dignity, of rank, and of honor, the lord, according to the ideas of those times, enjoyed a splendid pre-eminence over his vassals, his power over them was, comparatively speaking, extremely small. Thus, therefore, the supposed preservation of the *dominium directum*, or real ownership, to the lord, after he had parted with the beneficial ownership, or *dominium utile*, to the tenant; the exclusion of moveable property, from serving either as the sign or the subject of the relation between the sovereign and the feudatory; and the military nature of this relation, including in it the other circumstances before noticed, should be considered as three principal points which distinguish the law of feuds from every other law. To these the book of fiefs, and Cujas, and after them, sir Henry Spelman, add the hereditary nature of fiefs; and it is observable, that Littleton in his explanation of the word *fee*, says, it is the same as inheritance, without adverting to any other quality of a fief. But, as fiefs were not allowed to go in a course of descent, till after a considerable period of time, from their first introduction, and, as they might always be granted for a less estate, than an estate of inheritance, there seems to be no reason to suppose this descendible quality is essential to their nature. We have therefore omitted it.

Besides these, (which may be considered as the *essentials* of a fee,) there are qualities, which every fee should possess, to answer the notions originally entertained of this species of property. Thus, fiefs should be granted without price; to persons duly qualified; and the services should not be fixed to any particular mode or time of service. A fief possessing the essential and secondary qualities, we have noticed, was considered to be a *proper* fief. The absence of any of the qualities, reckoned essential, necessarily precluded the feudal tenure. But any, or all of the qualities reckoned merely proper, might be dispensed with, at the discretion of the parties, without precluding the tenure, according to the maxim, *Modus et conventio vincunt legem*. This introduced the distinction between proper and improper fiefs. But, wherever the feudal tenure was admitted, the fief was presumed to be a proper fief, till the contrary was shewn, and it could only be shewn by referring to the original investiture. Thence the maxim, in these cases, *Tenor investituræ est inspicendus*.

III. With respect to the PRINCIPAL WRITTEN DOCUMENTS, WHICH ARE THE SOURCES, FROM WHICH THE LEARNING OF FOREIGN FEUDS IS DERIVED: These may be divided into *CODES OF LAWS, CAPITULARIES, AND COLLECTIONS OF CUSTOMS*. It was long after the first revival of letters in Europe, that, the learned engaged in the study of the laws or antiquities of modern nations. When their curiosity was first directed to them, the barbarous style in which they are written, and the rough and inartificial state of manners they represent, were so shocking to their classical prejudices, that, they appear to have turned from them, with disgust and contempt. In time, however, they became sensible of their importance. They were

were led to the study of them, by those treatises on the feudal laws, which are generally printed at the end of the Justinianean collection. These are of Lombard extraction. This naturally gave rise to the opinion, that, fiefs appeared first in Italy, and were introduced there, by the Lombards. From Italy, the study of jurisprudence was imported into Germany: this opinion accompanied it there. At first it appears to have universally prevailed. But, when a more extensive knowledge of the antiquities of the German nations was obtained, there appeared reason to call it in question. Many thought the claims of other nations, to the honor of having introduced the feudal polity, were better founded. Some ascribed them to the Franks; others, denying the exclusive claim of any nation in particular, ascribed them to the German tribes in general; and asserted, that, the outline of the law of feuds is clearly discoverable in the habits, manners, and laws of those nations, whilst still inhabitants of the Hercynian wood. The *time* when feuds first made their appearance, has equally been a subject of controversy. The *word* itself is not to be found in any public document, of acknowledged authenticity, before the 11th century.

The most antient, and one of the most important *CODES OF LAW*, in use among the feudal nations, is the *Salic law*. It is thought to derive its appellation from the Salians, who inhabited the country from the Lefer to the Carbonarian wood, in the confines of Brabant and Hainault. It was written, probably in the Latin language, about the beginning of the 5th century, by Wefogastus, Bodogastus, Salogastus, and Windogastus, the chiefs of the nation. It received considerable additions from Clovis, Childebert, Clotaire, Charlemagne, and Lewis the Debonnaire. There are two editions of it. These differ so considerably, that they have been treated as distinct codes. The Franks who occupied the country upon the Rhine, the Meuse and the Scheldt, were known by the name of the Ripuarians, and were governed by a collection of laws, which, from them, was called the *Ripuarian law*. These laws seem to have been first promulgated by Theodoric, and to have been augmented by Dagobert. The punishments inflicted by the Ripuarian law, are more severe than the punishments inflicted by the Salic; and the Ripuarian law mentions the trial by judgment of God, and by duel. Theodoric also appears to have first promulgated the law of the *Alemanni*. The law of the *Burgundians* is supposed to have been promulgated about the beginning of the 5th century; that nation occupied the country which extends itself from Alsace to the Mediterranean, between the Rhone and the Alps. This was the most flourishing of the Gallic provinces invaded by the Germans; they established themselves in it, with the consent of the emperor Honorius. An alliance subsisted, for a considerable time, between them and the Romans; and some parts of their law appear to be taken from the Roman law. One of the most antient of the German codes is that, by which the *Angliones* and the *Werini* were governed. The territories of these nations were contiguous to those of the Saxons; and the Angliones are generally supposed to be the nation, known in our history, by the name of the Angles. A considerable portion of the law of the *Saxons* has reached us. The *Goths* also had their laws, which were promulgated by the Ostrogoths, in Italy; by the Visigoths, in Spain. The Goths were dispossessed of their conquests in Italy by the Lombards. No antient code of law, is more famous than

than the *law of the Lombards*; none discovers more evident traces of the feudal polity. It survived the destruction of that empire by Charlemagne, and is said to be in force, even now, in some cities of Italy. These were the principal laws, which the foreign nations, from whom the modern governments of Europe date their origin, first established, in those countries, in which they formed their respective settlements. Some degree of analogy may be discovered between them, and the general customs, which, from the accounts of Cæsar and Tacitus, we learn to have prevailed among them, in their supposed aboriginal state. A considerable part also of them is evidently borrowed from the Roman law, by which, in this instance, we must understand the Theodosian code. This was the more natural, as, notwithstanding the publication of the Ripuarian and Salic codes, the Roman subjects in Gaul, were indulged in the free use of the Theodosian laws, especially in the cases of marriage, inheritance, and other important transactions of private life. In their establishments of magistrates and civil tribunals, an imitation of the Roman polity is discoverable among the Franks; and, for a considerable time after their first conquests, frequent instances are to be found, in their history, of a deference, and in some instances, even of an acknowledgment of territorial submission, to the emperors of Rome.

In the course of time, all these laws were, in some measure at least, superseded by the *CAPITULARIES*. The word capitulary is generic, and denotes every kind of literary composition divided into chapters. Laws of this description appear to have been promulgated by Childebert, Clotaire, Carloman, and Pepin. But no sovereign seems to have promulgated so many of them, as Charlemagne. That monarch appears to have wished to effect, in a certain degree, an uniformity of law throughout his extensive dominions. With this view, it is supposed, he added many laws, divided into short chapters or heads, to the existing codes, sometimes to explain, sometimes to amend, and sometimes to reconcile or remove the difference between them. They were generally promulgated in public assemblies, composed of the sovereign and the chief men of the nation, as well ecclesiastics as secular. They regulated, equally, the spiritual and the temporal administration of the kingdom. The execution of them was intrusted to the bishops, the counts, and the *missi regii*. Many copies of them were made, one of which was generally preserved in the royal archives. The authority of the capitularies was very extensive; it prevailed in every kingdom, under the dominion of the Franks, and was submitted to, in many parts of Italy and Germany. The earliest collection of the capitularies, is that of Angese abbott of Fontenelles. It was adopted by Lewis the Debonnaire and Charles the Bald, and was publicly approved of in many councils of France and Germany. But, as Angese had omitted many capitularies in his collection, Benedict the Levite, that is, the deacon of the church of Mentz, added three books to them. Each of these collections was considered to be authentic, and, of course, appealed to, as law. There have been subsequent additions made to them. The best edition is that of Baluze in 1677. A splendid republication of this edition was begun by monsieur de Chiniac in 1780; he intended to comprise it in four volumes. Two only, have yet made their appearance. In the collections of ancient laws, the capitularies are generally followed by the *formularia*, or forms of forensic proceedings and legal instruments.

struments. Of these, the formulare of Marculphus is the most curious. The formularia generally close the collections of antient laws. With the Merovingian race, the Salic, Burgundian, and Visigothic laws expired. The capitularies remained in force, in Italy, longer than in Germany; and in France, longer than in Italy. The incursions of the Normans, the intestine confusion and weakness of government under the successors of Charlemagne, and, above all, the publication of the decretum of Gratian, which totally superseded them in all religious concerns, put an end to their authority in France.

They were, in some measure, succeeded by the *CUSTOMARY LAW*. It is not to be supposed, that, the codes of law, of which we have been speaking, entirely abrogated the usages or customs of the countries, in which they were promulgated. Those laws only were abrogated by them, which were contrary to the regulations they established. In other respects, the codes not only permitted, but, in some instances, expressly directed, that, the ancient usages should remain in force. Thus, in all the countries governed by the antient codes, there existed, at the same time, a written body of law, sanctioned by public authority, and usages or customs, admitted to be of public authority, by which those cases were governed, for which the written body of law contained no provision. After the antient codes and capitularies fell into desuetude, these customs multiplied. By degrees, written collections were made of them. Some of these were made by public authority; others were the collections of individuals, and depended therefore, for their weight, on the private authority of the individuals, by whom they were made, and the authority, which they insensibly obtained, in the courts of justice. Collections of this nature, committed to writing by public authority, form a considerable part of the law of France, and are a striking feature of the jurisprudence of that kingdom. The origin of them may be traced to the beginning of the Capetian race. The monarchs of that line, in the charters, by which they granted fiefs, prescribed the terms, upon which they were to be held. These they often abridged, enlarged, and explained, by subsequent charters. They also published charters of a more extensive nature. Some of these contained regulations for the possessions of their own domain; others contained general regulations for the kingdom at large. In imitation of these, the great vassals of the crown granted their charters, for the regulation of the possessions held of them. In the same manner, when allodial land was changed to feudal, charters were granted for the regulation of the fiefs; and, when villeins were enfranchised, possessions were generally given them, and charters were granted to regulate these possessions. Thus each seignory had its particular usages. Such was their diversity, that, throughout the whole kingdom, there could hardly be found two seignories, which were governed, in every point, by the same law. With a view more to ascertain, than to produce an uniformity in, these usages, though the latter of these objects was not quite neglected, Charles the Seventh and his successors caused to be reduced to writing, the different local customs, which prevailed throughout the kingdom. In 1453, some time after Charles the Seventh had expelled the English from France, he published an ordonnance, by which he directed, that, all the customs and usages, should be committed to writing, and verified by the practitioners of each place, then

then examined and sanctioned by the great council and parliament; and that, the customs, thus sanctioned, and those only, should have the force of laws. Such were the obstacles in the way of this measure, that, forty-two years elapsed before the customs of any one place were verified. From that time, the measure lingered, till the reign of Lewis the Twelfth; it was then resumed. About the year 1609, it was completed. The customs of Paris, Orleans, Normandy, and some other places, were afterwards reformed. Those of Artois and Saint Omer were reformed within the last hundred years. The manner of proceeding, both in reducing the customs, and reforming them, was, generally speaking, as follows. The king, by his letters patent, ordered an assembly of the three states of each province. When this assembly met, it directed the royal judges, greffiers, maires and syndics to prepare memoirs of all the customs, usages, and forms of practice, they had seen in use, from of old. On receiving these memoirs, the states chose a certain number of notables, and referred the memoirs to them, with directions to put them in order, and to frame a cahier, or short minute of their contents. This was read at the assembly of the states, and it was there considered, whether the customs were such, as they were stated to be, in the cahier. At each article, any deputy of the state, was at liberty to mention such observations as occurred to him. The articles were then adopted, rejected, or modified, at the pleasure of the assembly. They were then taken to parliament and registered. The customs of each place, thus reduced to writing and sanctioned, were called the *coutumier* of that place. These coutumiers were formed into one collection, called the *Coutumier de France*, or the *Grand Coutumier*. The best edition of this, is by Richebourg, in four volumes in folio. It contains near one hundred collections of the customs of provinces, and two hundred collections of the customs of cities, towns or villages. Each coutumier has been the subject of a commentary. Five and twenty commentaries have appeared, (some of them voluminous,) on the coutumier of Paris, alone. Of these commentaries, that of Dumoulin has the greatest celebrity. *Les Etablissements de St. Louis*, hold a high rank for the wisdom, with which they are written, and the curious matter they contain. The *Coutumier de Normandie*, for its high antiquity, and the relation it bears to the feudal jurisprudence of England, is particularly interesting to an English reader. Basnage's edition, and his learned commentary upon it, are well known. But the most curious of all collections of feudal law, is that entitled, *Affizes de Jerusalem*. In 1099, the object of the first crusade, was effected by the conquest of Jerusalem. Godfrey de Bouillon, who was elected king of Jerusalem, but refused the title, called an assembly of the states of his new kingdom. The patriarch, the chief lords, their vassals, and the arrere vassals attended. With general consent, the collection in question was framed, under the title of "*Les Loix, Statuts, & Coutumes, accordées au Royaume de Jerusalem, par Godefroi de Bouillon, l'an 1099; par l'avis du Patriarche et des Barons.*" As this collection was made at a general assembly of feudal lords, it may naturally be supposed to contain, some of the wisest and most striking rules, by which, the feudal polity of Europe was then regulated. But, as the principal personages, who engaged in that crusade, came from France, it may be considered, as particularly descriptive of the laws and usages of that country. Such are the principal sources of the

feudal jurisprudence of the kingdom of France. It remains to take notice of some of the chief compilations by which the feudal polity of other kingdoms, is regulated. The authority, or at least the influence, which the capitularies, had on these, has been already noticed. After these, the attention is naturally directed to that collection, which, probably in the reign of Frederick the Second, Hugolinus, a Bononian lawyer, compiled from the writings of Obertus of Otto and Gerhardus Niger, and from the various customary laws, then prevailing in Italy, and added under the title, *Decima Collatio*, to the Novels. It is to be found in most editions of the *Corpus Juris Civilis*. In the edition of Cujas it is divided into five books; the first contains the treaties of Gerhardus Niger; the second and third, those of Obertus of Otto; the fourth is a selection from various authors; the fifth is a collection of constitutions of different emperors respecting feuds. To these is added the Golden Bull of the emperor Charles the Fourth. Authors are by no means agreed, either in the order, or division, of this collection. Several editions have been published of it. In that published by Joannes Calvinus or Calvus at Franckfort, in 1611, there is a collection of every passage, in the canon law, that seems to relate to the law of feuds. As this edition is scarce, and it may happen, that, some English reader may be desirous of seeing all these passages, the following short account of Calvinus or Calvus's selection of them, is transcribed from Hoffman's, *Dissertatio de Unico Juris feudalis Longobardici Libro*.—*Jurisprudentiam feudalem, sex libris comprehensam, sive potius consuetudines feudorum, secundum distributionem Cujacianam, edidit, et sub titulo libri feudorum VI. addidit, quidquid alicujus de hac materia momenti, in universo corpore juris canonici expressum invenerat; hoc est totum titulum decretalium Gregorii IX. sive capitula, Insinuatione 1. Et ex parte tua, 2. X. de feudis, porro cap. cæterum, 5 et novit, 13 de Judiciis, cap. Quæ in Ecclesiarium, 7 de Constitutionibus, cap. Ad aures, 10 In quibusdam, 12 et Gravem, 13 De Pænis, cap. Gravem, 53 de Sent. excomm. cap. Ex transmissa, 6 et verum, 7 de foro competente eorumque summaria.* The next treatise to be mentioned is, the Treatise de Beneficiis, generally cited under the appellation of, *Auctor vetus de Beneficiis*. It was first published by Thomasius at Hale 1708, with a dissertation on its author, and the time when it was written. He considers it to be certain, that, it was written after the year 800, and before the year 1250, and conjectures, that, it was not written before the emperor Otho, and that, it was written, before the emperor Conrad the Second. To these must be added the *Jus Feudale Saxonicum*; which seems to be a part of, or an appendix to, a treatise of great celebrity in Germany, intitled the *Speculum Saxonicum*. The *Jus Feudale Saxonicum*, is said by Struvius, to have been translated, by Goldastus, from the German, into the Latin language, for the benefit of the Poles. It is supposed to have been published, between the year 1215, and the year 1250. The *Speculum Suevicum* seems to have been composed, in imitation of the *Speculum Saxonicum*, probably, between the year 1250, and the year 1400. To this is added the *Jus Feudale Allemmanicum* composed about the same time, and probably by the same author. But none of these collections acquired the same authority, as the books of the fiefs. They were known by the name of the Lombard law. By degrees they were admitted, as authority, by most of the courts, and taught in most of the academies of Italy and

and Germany. Like the civil and canon law, they became the subject of innumerable glosses. Those of Columbinus were so much esteemed, that, no one, it is said, ventured to publish any after him. About the end of the 13th century, James of Ardezene published a new edition of the Gloss of Columbinus, and added, under the title of *Capitula Extraordinaria*, a collection of adjudged cases, on feudal matters. This was inserted in some of the latter editions of the *Corpus Juris*. About the year 1435, Mincuccius de Prato veteri, a Bononian lawyer, by the orders of the emperor Sigismond, gave a new edition of the Books of the Fiefs, with the Gloss of Columbinus. These were confirmed by the emperor Sigismond, and afterwards by the emperor Frederick the 3d, and publicly taught in the university of Bononia. Such are the principal sources of the feudal jurisprudence of foreign countries.

IV. THE EARLY HISTORY OF THE FEUDS OF FOREIGN COUNTRIES is involved in a considerable degree of obscurity. That in the time of Pepin the feudal polity arrived at a degree of maturity and consistence, is certain. It must, therefore, have previously had, its rise and progress. Some vestiges of these are discoverable in the scanty materials which have reached us, of the history and antiquities of those early times. We find mention in them of the leuds,—of lands entrusted (commendati) by the king to his followers;—of estates, which, on account of the infidelity, or the cowardice of the proprietary, or his placing himself under another lord, the king takes from him, and restores to the fief. There is also mention of the pares comitum, and the fideles, and of reinvesting the leudes, who had been unjustly deprived of their possessions. At first kings alone granted fiefs. They granted them to laymen only, not to ecclesiastics; and to such only who were free, and probably to the most important only of their followers. They were not granted, for any certain, or determinate period of time; they were not transmissible to the descendants of the grantee; they were resumable on the bad conduct of the vassal, without the sovereign's being obliged to show the cause of the resumption, or having recourse to any judicial process. The vassal had no power to alienate them. Every freeman was subject to the obligation of military duty; this was the case, in a more particular manner, of the feudal tenants; they were to attend the sovereign on horseback, and in complete armour, that is, with the breast-plate, the shield, the spear, the helmet, and the sword. They were to guard his life, member, mind and right honour. They were first called *homines*, *fideles*, *leudes*, *antrustiones*; to all these the appellation of *vassals* succeeded. It appears, that, in early times, the feudal tenants were numerous. A considerable part however of the subjects were free from the feudal tenure. The lands held by these, were called allodial. The proprietors of them, were under the general obligation of military service, and were subject to general taxation. Their particular nature was chiefly discernible in this, that, they differed from the villeins, as they were freemen; and from the feudal tenants, as their possessions were from the first hereditary. For, originally, the crown itself was, not in the sense, in which we now use the word, hereditary. A marked preference was always shewn, both by the sovereign and the nation, to the royal lineage. But by each, the strict line of hereditary descent was occasionally interrupted, by calling to the throne a remote relation, to the prejudice of the ac-

tual heir. The government was monarchical; but strongly controuled by the people. Twice a year, the people, or as they were afterwards called, the states, assembled. The first of these general assemblies, was held originally in the month of March, afterwards in the month of May; and always in open air. Hence, from the time of meeting, the expression *le champ de Mars*, afterwards *le champ de Mai*. The second assembly was held in the autumn. It was divided into two classes. The first comprized the bishops, the abbots, the dukes, the counts, and the elders of the nation; and all of them had deliberative voices in the assembly. The second contained the magistrates, and the inferior officers; but these attended only to receive the orders of the assembly. The king proposed the subjects of debate, by his referendary; the members of the first class deliberated upon them; the king pronounced the decision. The acts were reduced to writing, under the name of capitularies, and the execution of them were entrusted to the members of the second class. The governors of provinces were called dukes; the counts were subordinate to them, and administered justice, in the districts committed to their care. The *missi regii*, were commissaries appointed by the king, to attend to the general administration of justice, throughout the nation. Next to the counts were the barons, or the chief land owners; then followed the general body of freemen; after these, came the artizans, the labourers, and the villeins. The general administration of affairs, was entrusted to the almoner, who was at the head of the clergy. The referendary and chancellor were the chief counsellors of state: then followed the chamberlain, the count of the palace, the high steward, the butler, the constable, the marshal, the four first huntsmen, and the grand falconer. Such appears to be the general outline of the feudal government, during the Carlovingian line. That line was extinguished, in France, by the accession of the Capetian line, in Germany, by the accession of the House of Saxony, and in Italy by the usurpation of the dukes. Soon after, or perhaps some time before this event, fiefs became hereditary. Even the offices of duke, count and margrave, and the other high offices of the crown were transmitted in the course of hereditary descent: and not long after, the right of primogeniture was universally established. It first took place, in the descent of the crown, but was soon admitted by every branch of the feud. This stability of possession was an immense addition to the power of the crown vassals. It enabled them to establish an independency of the crown. They usurped the sovereign property of the land, with civil and military authority over the inhabitants. The possessions, thus usurped, they granted out to their immediate tenants, and these granted them over to others, in like manner. By this means, though they always professed to hold their fiefs from the crown, they were in fact absolutely independent of it. They assumed in their territories, every royal prerogative: they promulgated laws; they exercised the power of life and death; they coined money; fixed the standard of weights and measures; granted safeguards; entertained a military force; and imposed taxes, with every other right supposed to be annexed to royalty. In their titles, they styled themselves, Dukes, &c. "by the grace of God," a prerogative avowedly confined to sovereign power. It was even admitted, that, if the king refused to do the lord justice, the lord might make war against him. In the *ordonnances* of St. Lewis, ch. 50, is this remarkable passage: "If the lord says

" to his liege tenant, Come with me, I am going to make war
 " against my sovereign, who has refused me the justice of his
 " court: upon this, the liegeman should answer in this manner to
 " the lord: I would willingly go to the king to know the truth of
 " what you say, that, he has denied you his court. And then he
 " shall go to the king, saying to him in this manner: Sir, the lord
 " in whose liegeance and fealty I am, has told me you have refused
 " the justice of your court; and upon this I am come expressly to
 " your majesty, to know if it is so; for my lord has summoned me
 " to go to war with you. And thereupon, if the king answers,
 " that, he will do no judgment in his court, the man shall return
 " immediately to his lord, and his lord shall equip him, and fit him
 " out at his own expence; and if he will not go with him, he
 " shall lose his fief by right. But if the king answers, that, he
 " will hear him, and do justice to the lord, the man shall return to
 " him, and shall say: Sir, the king has said to me, that, he will
 " willingly do you justice in his court. Upon which, if the lord
 " says, I never will enter into the king's court, come therefore
 " with me, according to the summons I have sent you; then the
 " man shall say, I will not go with you; and he shall not lose
 " his fief for his not going." This shews how powerful and ab-
 solute the great vassals were. The same motive which induced
 the vassals of the crown to attempt to make themselves independent
 of the crown, induced their tenants to make themselves independent
 of them. This introduced an ulterior state of vassallage. The
 king was called the *Sovereign Lord*; his immediate vassal was call-
 ed the *Suzereign*; and the tenants holding of him were called the
arrere vassals. Between these and the sovereign, the connection
 was very small. In those reigns even, when the power of the mo-
 narch was greatest, his authority over the *arrere* vassals was faint,
 and indirect. Of this the history of Joinville presents a striking
 instance: Previously to the departure of St. Lewis on the crusade,
 he summoned an assembly of his barons to attend him, and required
 them to swear, that, on the event of his decease during the expe-
 dition, they would be loyal and true to his son. Joinville his his-
 torian, a feudatory of the count of Champagne, though he pos-
 sessed a most enthusiastic veneration for the king, and the warmest
 attachment to his person, refused, on account of his vassallage, to the
 count, to take the oath; his words are, "*Il le me demanda, mais je*
ne vox faire point de serement, car je n'estoie pas son home." The con-
 sequence was, that, in every kingdom there were as many sovereigns,
 with the power and ensigns of royalty, as there were powerful vassals.
 With respect to *France*, Hugh Capet acquired the crown of that king-
 dom, by availing himself of the extreme weakness, to which it was
 reduced by the system of subinfeudation. After he acquired the
 throne, he used his utmost efforts to restore it to its antient splen-
 dor and strength. His successors pursued his views with undeviat-
 ing attention and policy; and with so much success, that, previously
 to the accession of Lewis the 13th, the seventy-two great fiefs of
 France were united to the crown, and all their feudal lords at-
 tended, at the states general in 1614, the last that were held, till
 the late memorable assembly of them in 1789. This system of
 re-union was compleated by the accession of the provinces of Lor-
 raine and Bar to the crown of France, in 1735. See *Abregé Chro-
 nologique de grands Fiefs de la Couronne de France*. Paris 1729.
 Like France, Spain was broken into as many principalities as it
 contained

contained barons. In the course of time, they were all absorbed in the more powerful kingdoms of Arragon and Castile; and, by the marriage of Ferdinand, the sovereign of Arragon, with Isabella, the sovereign of Castile, they were all united to descend in the same line. No such re-union took place in the empire. Under the immediate successors of Charlemagne, it was broken into innumerable principalities, never to be re-united. If we allow for the difference of public and private manners, it presents the same spectacle at this day, as the other states of Europe presented formerly, but, which is now peculiar to itself—a complex association of principalities more or less powerful, and more or less connected, with a nominal sovereignty in the emperor, as its supreme feudal chief. In England no such dismemberment as that we have been speaking of, took place; nor did the nobles ever acquire, in England, that sovereign or even independent power, which they acquired in Spain, Germany, or France. The power and influence of some of the English nobles were certainly great, and sometimes overshadowed royalty itself. But, it is evident, that, Nevil the great earl of Warwick, and the nobles of the house of Percy, the greatest subjects ever known in the country, were, in strength, dignity, power, and influence, and in every other point of view, greatly inferior to the dukes of Brittany or Burgundy, or the counts of Flanders. The nature of this note neither requires nor allows, a further deduction of the public history of the feuds of Europe, the four circumstances we have mentioned—the heirship of fiefs, the right of primogeniture, the intermediate sovereignty of the crown vassals, and the introduction of subinfeudation, completed the triumph of the feud over monarchy. Here the historical deduction naturally closes. The Carlovingian family is the important link, which connects antient with modern history, Roman jurisprudence with the codes of the German tribes, and the law of civil obligation, with the law of tenure.

V. It remains to say something of the REVOLUTIONS OF THE FEUD IN THE JURISPRUDENCE OF OUR OWN NATION.

(1.) *AS TO THE TIME WHEN IT WAS INTRODUCED.* Whether feuds prevailed in England, before the Norman conquest, has been the subject of much dispute. In 1607, an event happened, which occasioned the question to be discussed, with a profusion of learning. Several estates within the counties of Roscommon, Sligo, Mayo, and Galway, being unsettled as to their titles, king James the 1st, by commission, under the great seal, authorized certain commissioners, of whom sir Henry Spelman was one, to make grants of these estates. In exercise of this authority, the commissioners made a grant of lands in Mayo to lord Dillon. King Charles the 1st issued a commission, to enquire into defective titles: and orders were given, that, all persons, who had any of the estates in question by letters patent from the crown, should produce the letters, or an inrolment of them, before the lord deputy and council. In pursuance of these orders, the letters patent to lord Dillon were produced. It was found, that, the lands were granted by them “to the lord Dillon and his heirs, to hold by knight service, as of his majesty’s castle of Dublin.” It was admitted, that, the commissioners had exceeded their commission, in reserving a *mean* tenure, to the prejudice of the crown, when they ought to have reserved, either an express tenure, by knight service, in capite, or not to have mentioned

any

any tenure; in which case, the law would have implied a tenure in capite. The question, therefore, was, whether, the deficiency of the tenure, so far affected the grant, as wholly to destroy the legal effect of it; or whether, the letters patent might not be good, as to the land, and void only as to the tenure. The case was argued, several days, by counsel, on both sides, and was afterwards referred to the judges. They were required by the lord deputy and council, to consider of it, and to return their resolution. The judges disagreeing in opinion, it was thought necessary, for public satisfaction, to have it argued solemnly by them all. This was done, accordingly. Those who contended for the validity of the letters patent, urged, among other arguments, that, tenures in capite were brought into England, by the conquest, but, that grants were by the common law; and, being more ancient than tenures, must, of necessity, be distinct from the thing granted. From this, they inferred, that, though the reservation were void, the grant itself might be good. In the course of their arguments, on this point, they observed, that, sir Henry Spelman was mistaken, when, in his Glossary, under the word *Feudum*, he referred the original of feuds to the Norman conquest. This drew from him a reply. He published it under the title, "Of the Original Tenure by Knight Service in England." In this work, he argues, with great learning and strength of argument, that, tenures, such as they were granted, in the letters patent, by himself and the other commissioners, in Ireland, were not in use before the conquest. He distinguishes between, what, he calls the *servitia militaria* and the *servitutes militares*. He contends, that, the grievances and servitudes of fiefs, as wardships, marriages, &c. which to that day, he says, were never known to other nations, governed by the feudal law, were introduced by the conqueror. But he seems to concede, that, in a general sense, military service and feuds, were known to the Saxons. In this middle opinion, he appears to be followed by two very great authorities, lord Hale, and sir William Blackstone. Almost all writers, however, are agreed, that, in the reign of the conqueror, the feudal law was completely established. Upon the whole, the most probable conjecture appears to be, that, evident traces of something similar to the feud, may be traced in the Saxon polity; that, it was established, with its concomitant appendage of fruits and services, by the Norman barons, in the possessions, which were parcelled out among them, by the conqueror; and that, about the middle of his reign, it was formally, and universally established by law. This universality of tenure, is, perhaps, peculiar to England. In other kingdoms, those parts of the lands, which were permitted to remain in the hands of the natives, and a considerable part of those, which the conquerors parcelled out among themselves, were not originally subject to tenure. In the earliest age, however, of the feudal law, some advantages attended tenure, and frequently occasioned the conversion of allodial into feudal property. But in the anarchy, which followed the removal of the Carlovingian dynasty, there was an end of all political government: so that, almost all persons found it advantageous, to enter into the feud. To effect this, they delivered up their lands sometimes to the sovereign, sometimes to some powerful lord, and sometimes to the church, on condition to receive it back in feudality. Lands thus delivered and returned, received the appellation of *feuda data et oblata*. Some portion of lands, however, still remained free. Of this the proportion differs in the countries

countries on the continent. In some, the courts presume it to be feudal, till it is proved to be allodial. In others, the presumption is in favour of its allodality. See before 63. a. note (1). But with us, in the eye of the law, tenure is universal; that is, the *dominium directum* of all the lands in the kingdom is in the crown; The *dominium utile*, of them is in the tenant.

V. (2.) *AS TO THE FRUITS AND INCIDENTS OF THE FEUDAL TENURE.* These, in the original simplicity of the feud, were reducible to two: on the part of the lord, to the obligation of warranty, that is, to defend the title of his tenant against all others, and, when subinfeudation was introduced, to the further obligation of acquittal, that is, to keep the tenant free from molestation, in respect of the services due to the lords paramount: On the part of the tenant, to an obligation, of giving his lord his aid, that is, his military assistance and services in defence of the feud. But this primitive simplicity of reciprocal obligation, was soon destroyed. Different sorts of tenures were established, and the fruits and incidents of them were multiplied. A detail of these does not seem to be required, in this place; especially as a full and masterly account of them has been already given by Mr. Justice Blackstone.

V. (3.) The branches of feudal jurisprudence, which principally concern the tenures of Littleton and Sir Edward Coke's commentary, and which, therefore, may be thought such as at once call for and limit the present investigation, are those, which relate to the inheritance and alienation of the feud.—With respect to the *INHERITANCE OF THE FEUD*, it may be observed, that, at the same time, that succession itself prevails in every civilized country, the principle, by which it is governed, and the order in which it proceeds, are, every where, different. The principle and order of the feudal succession, are peculiar to that system of polity. Nothing, perhaps, will shew these in so strong a light, as bringing them into contrast, with the doctrines of inheritance in the civil law. It has been already observed, that, in the Roman law, the distinction between real and personal property, except in the term of prescription, is seldom discoverable: but, that in the feudal law, the legal incidents and qualities of the two kinds of property are entirely dissimilar. This is no where more striking, than in the article of inheritance. The Roman law of inheritance embraces both kinds of property, equally; the feudal law of inheritance, is, most strictly, confined to real property, and, (it was almost said,) turns with disdain, from all property of the personal kind. By the Roman law, the heir was a person instituted by the party himself, or, in default of such institution, appointed by the law, to succeed both to his real and personal property, and to all his rights and obligations: In the feudal law, he is a person related in blood to the ancestor; and, in consequence of that relationship, entitled, either, merely by act of law, or, by the concurrent effect of law and the charter of investiture, to succeed, at the ancestor's decease, to his real or immoveable property, not given away from him by will. In the civil law, he was considered, as representing the person of the deceased; in consequence of that supposed representation, the law cast on him, the property and rights of the deceased, and fixed on him, all the deceased's charges and obligations. Thus, by a fiction of the law, the person of the ancestor was continued in the heir, so, that, in all religious, moral, and civil rights and obligations, the heir, in the language

language of the Roman lawyers, was *eadem persona cum defuncto*. In the feudal system, he succeeded to the real property, only, of the ancestor; and this, not under any supposed representation to him, or in consequence of any supposed continuation of his person, but as related to him in blood, and, in consequence of that relationship, as a person designated, by the original feudal contract, to succeed to the fief. By the civil law, every person was considered as capable of instituting an heir; where the party died, without instituting an heir, the law introduced a necessary heir. Hence, the distinction in that law, between the *heredis sui, necessarii, nati, and facti*. In the feudal law, it was an acknowledged maxim, that, God only can make an heir. Hence the opposite maxim of the feuds, *solus Deus potest facere hæredem, non homo*. By the Roman law, in consequence of the fiction, that, the heir was the same person with the deceased, he was bound to acquit all the deceased's obligations, not only, so far as the property derived by him from his ancestor extended, but, in their utmost extent. The first indulgence granted the heir, was, that, the pretor allowed him, a certain time, in which, he might deliberate, whether he would accept the succession or not; at the expiration of which, he was obliged, either, absolutely to accept, or, absolutely to renounce, the inheritance. Justinian established still further, in favour of the heir, a liberty of accepting the inheritance, with, what was termed, the benefit of an inventory, that is, a condition, that, he should not be liable beyond the value of the property of the deceased. Nothing of this was known in the polity of the feudal association. In the intendment of that law, the heir, as it has been observed before, came under the original feudal contract: He claimed nothing as a gift from the ancestor: He derived all from the original donor: He could not, therefore, be liable, to any of the obligations of the ancestor. Another maxim of the Roman law was, that, the representation of the heir to the ancestor, did not take effect, till he determined his election to accept the succession, by what was termed, an *additio hæreditatis*. In the feud, the law cast the right of heirship on the heir, immediately upon the ancestor's, decease; and though, when the doctrine of alienation was introduced, the ancestor, by disposing of all his property, might render his right of heirship perfectly nugatory, so far as related to the property of which the ancestor died seised; yet, upon this account, he was not less, the ancestor's heir. Thus, by the Roman law, as fixed by Justinian, it was at the party's opinion, whether he would, or would not, be invested with the character of heir. The feud left him no option; it forced the heritable quality on him; and the dead man, in the language of that law, gave seisin to the living, and forced on him the character of heir. Hence the maxim and expression of the feud, *le mort saisit le vif*. From the supposed representation, in the Roman law, of the deceased, by the heir, it became a maxim of that law, that, no person could die testate, as to part of his property, and intestate as to the other part. The consequence of this was, that, whoever succeeded as heir, whether he took the entirety, or a fractionary part only of the property of the testator, was held, in consequence of that heirship, to continue the person of the ancestor. In the feudal law, after testamentary alienation was allowed, the contrary maxim ever prevailed; the party might die testate, as to one part of his property, and intestate as to another. To sum up the contrast in a few words;—by the Roman law, the heir was a person appointed, indis-

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criminally, by the law, or the deceased, to represent him; and, in consequence of that representation, was entitled to his property, and bound by his obligations. In the feudal law, the heir was a person of the blood of the ancestor, appointed, by the original contract, to the succession, or, at least invested with a capacity of succession; and, in consequence of that succession, was supposed, more by the general notions of mankind, than by the notions of the feudal polity, to represent the ancestor. By the Roman law, the heir succeeded to the property of the ancestor, in consequence of his civil representation of him, and supposed continuation of his person: In the feudal law, he acquired a notional representation to the ancestor in consequence of the feudal succession. In the Roman law, real and personal property were equally the subject of inheritance:—in the feudal law, inheritance was confined to real property. The Roman heir claims, as such, all from the person last possessed, and nothing from the original donor: the feudal heir, claims, as such, all from the donor, and nothing from the person last possessed.

V. (4.) The same difference prevailed in these laws, with respect to the *ORDER OF SUCCESSION*. By the Roman law, as it was finally settled by the Novels, on the decease of an intestate, the descendants, of whatever degree, were called to the succession, in exclusion of all other relations, whether ascendants or collaterals, and without regard to primogeniture, or preference to sex. Where the intestate left no descendants, such ascendants as were nearest in degree, male or female, paternal or maternal, succeeded to his estate, in exclusion of the remoter heirs, and without any regard to representation; but, with this exception, that, where the deceased left brothers and sisters, of the whole blood, besides ascendants, all succeeded in equal portions, *in capita*; and here, if, besides ascendants, the deceased left brothers' and sisters' children of the whole blood, the children succeeded to their parent's share, by representation, *in stirpes*. Where the intestate left no descendants, and no ascendants, the law called the collaterals to the succession, giving a preference to the whole blood. By the law of the code, if no one was left in the descending, ascending, or collateral lines, the husband succeeded to the estate of the wife, and the wife to that of the husband. This was altered by the law of the Novels. In default of a legal heir, the estate became a *res caduca*; and the fiscus or exchequer succeeded. Such appears to be the general outline of the Roman law, respecting successions. The feudal regulations respecting successions, differed from it, in almost every respect. Originally fiefs were granted to be held at the will of the donor, and were, therefore, resumable at his pleasure; then, they were granted for a year certain; then, for the life of the grantee; then, to such of the sons of the grantee, as the donor should appoint. Then, all the sons, and in default of sons, the grandsons were called to the succession of the fief: in the process of time, it was opened to the 4th, 5th, 6th, and 7th, generations, and afterwards to all the male descendants, claiming through males, of the first grantee; and, at last, was suffered to diverge generally, to collaterals. But this, as to such collaterals as were not lineal heirs of the first donee, was effected through the medium of a fiction completely and peculiarly feudal. When a person took by descent, his brothers, though in the collateral line of relationship to him, were in the direct course of lineal descent from the ancestor. In proportion as the descent from the ancestor was removed, the number of persons thus claim-

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ing collaterally from the last, and lineally from the first, taker, was proportionally multiplied. In the course of time, the first taking ancestor was forgot, and then, it was presumed, that, all who could claim collaterally from the person last in the seisin of the fee, were of the blood of the original donee. On this ground, in latter times, when, upon the grant of a fief, it was intended, that, on failure of lineal heirs, the fief should diverge to the collateral line, it was granted, to be held with the incidents and properties, with which the donee would have held it, had it vested in him by descent, in a line of transmission from a distant and forgotten ancestor; and, among them, that of transmissibility to collaterals.—This general heirship of fiefs, in the male line, was introduced, in France, soon after the succession of the Capetian line, and, in Italy and Germany, during the period, in which the empire was possessed by the house of Franconia, and the earlier emperors of the house of Suabia. A similar progress in the descent of lands, may be traced in the jurisprudence of our own country. The policy of most feudal countries, has shewn some preference of the whole blood to the half blood, and a great unwillingness to admit females into the fief. In England, there has been a more rigid exclusion of half blood, and a less rigid exclusion of the female line, from the feudal succession, than is to be found in the law of almost any other country, governed by the feudal polity. To us also, it seems to be peculiar, to exclude the parent and all others in the ascending line, from the immediate succession to the fief. But, the most striking point of difference between the Roman, and the feudal, course of succession, is, the prerogative allowed by the latter to primogeniture. To the eldest son, the Roman law shewed no preference; wherever the feudal polity has been established, he has been allowed several important prerogatives. In England primogeniture obtained in military fiefs, as early as the reign of William the Conqueror, but, with this qualification, that, where the father had several fiefs, the *primum patris feudum*, only, belonged to the eldest son. In the reign of Henry the 2d, primogeniture prevailed absolutely in military fiefs, and, in the reign of Henry the 3d, or soon afterwards, the same absolute right to the succession by primogeniture, obtained in socage lands. Thus in all countries, where the feud has been established, a marked distinction in the order of succession, has, in direct opposition to every principle and practice of the Roman law, been shewn to primogeniture. *Usu*, says Zoësius, *ad omnia feuda serpsit, ut vel ex asse majori cedant, vel major præcipuum aliquod in iis habeant*. But, it is observable, that, a total exclusion of the younger sons is, perhaps, peculiar to England. In other countries, some portion of the fief, or some charge upon it, is in many cases, at least, secured, by law, to the younger sons. In some places, this is secured to them for their lives only; in others, their descendants succeed to it. Still, the eldest son, in the eye of the law, represents the fee. In Spain, the patrimony is divided into fifteen shares. Three shares, that is, a fifth of the whole, are first subtracted; afterwards, four shares, or a third of the remaining twelve shares, This fifth and third, as they are called, are termed a *majoratus*, and are at the free disposition of the parents; the remaining shares are appropriated to the children. The *majoratus*, may be, and generally is entailed upon the eldest son of the family, but a greater portion of the patrimony cannot be settled on him, without leave from the crown. The singular nature of this provision, has occasioned a par-

ticular mention of it by most feudal writers; it was therefore thought proper to notice it, in this place. Any further mention of the particular customs respecting primogeniture, appears unnecessary.

V. (5.) Another striking point of difference *between the Roman and the feudal polity*, with respect to real property, is, the contrast between *THE ABSOLUTE DOMINION OVER THE INHERITANCE*, with which the Roman law invested the heir, and the numerous and intricate fetters, with which the feudal jurisprudence, (of England particularly) has permitted it to be bound. The Roman law, (it has been already stated, at some length,) permitted a person to appoint his heir, and invested him, on the testator's decease, with all his rights and obligations. Before Justinian introduced the benefit of the inventory, as the heir, by accepting the inheritance, subjected himself to all the testator's debts, the office was sometimes refused, as dangerous. This gave rise to the vulgar, the pupillar, and the quasipupillar substitution. The vulgar substitution was, where the testator appointed one to be his heir, and, if he refused, substituted another in his place. These conditional substitutions might be extended to any number of heirs. When they were made, the heirs instituted under them, were called, in succession, to accept or refuse, the inheritance. When once an heir accepted the inheritance, it vested in him absolutely, and all the subsequent substitutions then entirely failed. The pupillar substitution was, where a father substituted an heir to his children, under his power of disposing of his own estate and theirs, in case the child refused to accept the inheritance, or died before the age of puberty. The quasi-pupillar substitution was, where the children past puberty, being unable, from some infirmity of mind or body, to make a testament for themselves, the father in imitation of the pupillar substitution, made a testament for them. In all these cases, it is evident the dominion over, and substance of, the inheritance were preserved entire and unqualified. In two instances, and in these only, the Roman law admitted an exception to their integrity. The first was, in the case of an usufruct; where a right was given to one person, to use and enjoy the profits of a thing, belonging to another. The second was, the case of a *fidei-commissum*, when the inheritance was disposed, in whole, or in part, to an heir, in trust, that he should dispose of it to another. But neither of these devices suspended the absolute vesting of the inheritance. An usufruct could not be extended beyond the life of the usufructuary. The *fidei-commisarius*, (the person beneficially interested in the inheritance,) could compel from the *hæres fiduciarius*, (the trustee,) a transfer of the inheritance immediately on the accrual of his right. Thus the property and dominion of the inheritance absolutely vested in him in equity, with an immediate right to compel a legal transfer of it. In this manner, by the Roman law, the heir succeeded, in every case, to the absolute property of the inheritance, and to all the rights and obligations of the ancestor. It should, however, be observed, that, this account of the simplicity of the Roman law, with respect to the tenure, if it may be so called, of property, applies to it only, in the state of simplicity, in which it was placed, by the Trebellian and Pegasian decrees. In a further part of this annotation, we shall have occasion to mention the alteration occasioned by the introduction of fidei-commisary substitutions. These are to be considered, as a departure from the genuine spirit of the Roman law, in the doctrines respecting inheritances. See *Huberi Prælectiones ad Inst.*
lib.

lib. 2. tit. 23. § 18. From that spirit, nothing could be more different, with respect to the tenure and modifications of property, than the regulations of the feudal law. According to these, the heir derived his title, no otherwise through his ancestor, than from the necessity, of mentioning him, in his pedigree. This enabled him to describe himself, as an object, to whom the succession was originally limited. Thus he was a nominee in the original grant; he took every thing from the grantor, nothing from his ancestor. The consequence was, that, while the absolute or ultimate ownership was supposed to reside in the lord, the ancestor and the heirs, took equally as a succession of usufructuaries, each of whom, during his life, enjoyed the beneficial, but none of whom possessed, or could lawfully dispose of, the direct or absolute dominion, of the property. Thus, while, by the Roman law, and the law of almost every other country, property is vested in the possessor solely and absolutely, every species of feudal property, is necessarily subject to the three distinct and clashing, though concurrent, rights of the lord, the tenant, and the heir. It follows, that, by the original principles of the feudal law, *fiefs could neither be aliened* nor charged with debts, and in direct contradiction to almost every other system of law, the feudal system of polity made land unalienable, and absolutely took it out of commerce.

V. (6.) *THE VARIOUS MODES WHICH HAVE BEEN USED, IN THE COUNTRIES WHERE THE FEUD HAS BEEN ESTABLISHED, TO ELUDE, OR OVERTHROW, THE RESTRAINTS UPON ALIENATION*, form one of the most important parts of feudal learning. The mode, by which this has been effected in England, is peculiar to itself. It has been the principal occasion of the striking difference, to be observed, in the feudal jurisprudence of England, and that, of other countries. One artifice to elude the feudal restraint upon alienation, seems to have been resorted to, by every nation where the feudal policy, has been established,—that of *subinfeudation*. Its effect in aggrandizing the vassals, and rendering them independent of the throne has been already noticed. It also served as an indirect mode of transferring the fief. It was inhibited in England, to all but the king's vassals, by the statute *quia emptores terrarum*, 18. Edward 1st; and this inhibition was extended to the king's vassals, by the statute *de prerogativa regis*, 17. Edw. 2. c. 6. In most other countries, it is still allowed, under some restrictions. The chief of these are, 1st, That, it must be a real subinfeudation, and not a sale, or other transaction, under the appearance or colour of a subinfeudation; 2d, That, the sub-vassal must be of equal, or at least, of suitable rank and circumstances. And, 3dly, The conditions, so far as the lord is interested in them, must be the same, as those, upon which the original investiture is granted. In other respects, the feudal history of alienation has varied. As it now stands, in almost every country, the lord's consent must be had. But in some, it still continues a matter of favour, in others, it is a matter of right, to which the tenant is always entitled, on paying certain fines to the lord. The principal of these are the *quint* and the *lods et ventes*. These the lord claims on every sale. In other cases, where the fief is transferred from one to another, the lord claims the *relevium* or *droit de rachat*, which, generally, is one year's produce of the fief. In many countries, where the tenant sells his fief, the lord has a *jus retractus*, or *retrait feudal*, by which, he has a right to become, himself, the purchaser of the fief, on reimbursing

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the stranger the price paid by him, for the purchase of it, and the costs attending the purchase. In many countries, also, the right of the heir is consulted by giving him the *retrait lignager*, by which, when a fief is sold, a relation of the vendor, within a certain degree of parentage, may entitle himself to repurchase the fief by an offer of the purchase money, interest, costs, and expences, or as it is termed in the writ, *offre de bourse, deniers, loyaux courts a parfaire*. Such is the general history of alienation in foreign countries. The history of alienation in England is very different. A liberty of alienating lands of purchase, at least where the party had no son, is allowed by a law of Henry the 1st, and expressly recognized by a law of Henry the 2d. Some time afterwards, it obtained generally, with little or no limitation. The indirect mode of aliening, through the medium of subinfeudation, the restraint of it, by *magna charta*, and its total abolition by the statutes *quia emptores*, and *de prerogativa regis*, have been already noticed.

V. (7.) But while the restraints upon alienation, so far as it was contrary to the general principles of the feudal tenure, were thus gradually removed, the policy and private views of individuals, found means to impose new restraints upon it. This was done by the introduction of conditional fees at the common law, and afterwards by the INTRODUCTION OF ENTAILS. We shall consider this species of limitation of property, with a view to the different modes of it, which have been admitted by the Roman law, and by the laws of France, Spain, Germany, Scotland, and England. With respect to the *Roman law*, we have, already had occasion to notice its simplicity, in the inheritance of property, as it was settled by the Trebellian and Pegasusian decrees, and its alteration, in this respect, by the introduction of the fidei-commissa. These gave rise to successive fidei-commissary substitutions. By multiplying these, and by prohibiting each substitute from aliening the inheritance, property was absolutely taken out of commerce, and fixed, in a settled and invariable course of devolution, in particular families. There is reason to suppose this mode of altering property, was never common, and the policy of Justinian soon interfered to check it. By the 159th Novel, he restrained fidei-commissary substitutions to four degrees, including the party himself, who instituted the substitution. With the third substitute, therefore, the power of the testator expired, the absolute dominion vesting absolutely in him. This, in some measure, restored the law to its primitive simplicity. A similar progress is discoverable in the history of *French Jurisprudence* respecting Substitutions. The law of France appears to have generally admitted perpetual substitutions. The ordonnance of Orleans, in 1560, restrained them to two degrees, exclusive of the instituant. That ordonnance not having a retrospective operation, and the inconvenience arising from prior substitutions being greatly felt, the ordonnance of Moulins, in 1566, restrained all substitutions, anterior to the ordonnance of Orleans, to the fourth degree exclusive of the instituant. The ordonnance of 1747 fixed the law on this important branch of real property. It was framed with great deliberation, by the chancellor d'Aguesseau, after taking the sentiments of every parliament in the kingdom, upon forty-five different questions proposed to them on the subject. These questions, and the answers of the parliaments, have been published under the title, *Questions concernant les Substitutions*, Toulouse 1770. The ordonnance

donnance of 1747 confined substitutions, with some exceptions, to two degrees, and directed the degrees to be computed, by the individuals, in whom the substitution vested. Upon this, it was held, that, if the testator appointed several persons, jointly, to the inheritance, they formed, together, but one degree; if he appointed to it several persons successively, though in the same degree of kindred, as brothers or sisters, each person in whom the succession vested, formed one degree. The mode of settlement used in *Spain*, by what is termed a *Majoratus* has been already noticed. In *Germany*, the restraints imposed by the feudal law, on the alienation of property confined by the original investiture, to a particular channel of descent, still prevail; so that the same intricate intails subsist with them, as with us; without those modes of eluding them which the laws of *England* have sanctioned. *The tailzies or entails of Scotland* appear still more intricate. The least restrictive of these is called a *Simple Destination*. It is defeasible and attachable by creditors, so that it amounts to no more, than a designation who is to succeed to the estate, in case the temporary possessor neither disposes of it, nor charges it. The next degree of tailzie, is a tailzie with prohibitory clauses. The proprietor of an estate of this nature, cannot convey it gratuitously, but he may dispose of it for onerous causes, and it may be attached by creditors. The substitutes, however, as creditors by virtue of the prohibitory clause, may by a process in *Scotland*, termed an inhibition, secure themselves against future debts or contracts. The third and strictest degree of tailzie, is a tailzie guarded with irritant and resolute clauses. This is a compleat bar to every species of alienation, voluntary or involuntary. The efficacy of these clauses, both against the heir, and the creditors of the tenant in tail, aliening, was established in 1662, by a solemn decision of the judges of *Scotland*, in the case of the viscount Stormont against the creditors of the earl of Anandale; and that decision was sanctioned by a statute of the Scottish parliament in 1685. This mode of entail appears to be greatly discouraged by the judicature of the country; and modes of eluding it have been discovered, and allowed in their courts of justice. With respect to *English entails*, we have taken notice of the maxim of the Roman law, that, no man can name an heir to succeed to his heir; and, of the opposite maxim of our law, that, God only can make an heir, not man. The latter maxim was understood, with this qualification, that, though the party could not introduce a person into the heirship of the fief, who was not originally capable of inheriting the fief, by being of the blood of the donee, still he might give a preference to a particular class of persons, falling within that description, and might exclude others. Thus, in *England*, according to sir William Blackstone, (lib. 2. ch. 7. s. 2.) as in all other countries, where fiefs have prevailed, they might originally be limited to the male, either in preference to, or in utter exclusion of, the female descendants, of the party. In the same manner, they might be limited to a male and his descendants by a particular wife, or to a female and her descendants by a particular husband, or to both the parents and the heirs of both their bodies. These, at the common law, were all termed, *Estates in fee simple conditional*. The condition, from which these estates took their appellation, did not prevent the fee from vesting in the donee, immediately upon the gift; it only authorized the donor to re-enter, if the party had not issue, or, if, having issue, the issue afterwards failed, and neither the

donee,

donee, nor the issue aliened. Upon this principle, it was considered to suspend the power of absolute alienation, till the birth of issue. But upon the birth of issue, the party had the same power of alienation over the conditional fee, as he had over an absolute fee. The statute *de donis conditionalibus* took away this power. It did not, however, affect the estate of the donee, in any other respect. The consequence of this was, that, a tenant in tail was as much seised of the inheritance, after the statute *de donis*, as a tenant in fee simple conditional, was, before it. Thus, therefore, an estate, of inheritance remained in the donee; but, a particular description of heirs only being entitled to take under it, it received the appellation of an *estate tail*, that, is, an estate docked, cut off, or abridged, in contradistinction from the estate in fee simple absolute. Thus, the fee was preserved to the issue, while there was issue to take it, and was preserved to the donor, when the issue failed. This reversionary right of the donor was soon found to be susceptible of the same modifications, as a present estate, and, therefore, limitations, either of the whole reversion, or of partial estates out of it, were made to strangers. It frequently happened, that, after a limitation to one series of heirs, another series of heirs were substituted, to take the fief, on the failure of the first series. The first person then, to whom this subsequent series was limited, was made the stock, or *terminus*, of this subsequent line of inheritance. In these cases, the substitute did not take in quality of heir to the last taker, but as a new purchaser under the original donor. Thus, in direct opposition to every genuine principle of the Roman law, endless substitutions were introduced, not only of individuals, but of whole lines of descendants, and the estate being thus unalienably preserved to the issue, there was a still more pointed opposition, to the maxim of the Roman law, that, the heir necessarily succeeded to the obligations of the deceased.

V. (8) These new restraints upon property were never favorably received, and various *ARTIFICES WERE USED TO ELUDE THEM*. One of these, was carried into execution, through the medium of a *discontinuance*. It has been observed, that, though the statute *de donis* took away the power of lawful alienation, it did not suspend the vesting of the fee. The alienation, therefore, of the donee tenant in tail, was no forfeiture; and the alienee, as he took his conveyance from a person seised of the fee, was considered as coming in, under a lawful transfer of the inheritance. Now, it was an established rule of law, that, whenever any person acquired a presumptive right of possession, his possession was not to be defeated by entry. The consequence of this was, that, in these cases, the alienation was unimpeachable during the life of the alienor, and, after his decease, the heir could not assert his title by the summary process of entry, but, was driven to the expensive and dilatory process of a formedon; this was termed a *discontinuance*. The expence and delay attending a formedon frequently prevented the tenant in tail, from resorting to it, to assert his right. In the course of time the period for asserting it elapsed, and thus, therefore, virtually, the discontinuance proved a bar to the entail. Another mode, of eluding estates tail was, by *warranty*. When lands were conveyed from one to another, the grantor, for the greater security of the grantee, usually warranted, that is, entered into a covenant to defend the possession to the grantee, and, in case of eviction, to make him a recompence. This obligation of the ancestor was considered

considered to be a covenant real, and therefore, on his decease, descended on the heir. Thus, it frequently happened, that, on the death of the ancestor, his contract of warranty descended on the person, who would, otherwise, be entitled, as his heir, to the lands warranted, so that, the obligation of warranty, and the right to the lands warranted, met in the same person. The consequence of this was, that, as heir in tail, he was entitled to the lands; as heir general, he was bound to defend the title of his ancestor's alienee: thus, if, on the one hand, he was entitled to recover the lands, the alienee was entitled, on the other, to recover an equivalent recompence from him. To prevent this circuitry, it was held, that, the obligation to warranty, precluded him from claiming the lands warranted. Against this, in some cases, the statute *de donis*, provided. The general doctrine was, that, where the heir claimed, as heir, the lands warranted, he was bound by the warranty, in those cases only, where he inherited from the ancestor, fee simple lands of equal value; but where he claimed as purchaser, he was bound by the warranty, though no such lands descended upon him. This is the meaning of the maxim, that, warranty, when lineal, is a bar with assets; and when collateral, is a bar without assets, to the right of the tenant in tail, on whom it devolved. By these artifices, the force of entails was eluded. In the progress of time, methods were discovered, by which the law allowed them, to be absolutely destroyed. The first of these has received the name of a *common recovery*. In the language of the courts, a recovery is the effect of a sentence, in a solemn judgment, whereby the party is restored to a former right. In the particular language of our courts, when applied to judgments in adversary actions, it is the effect of a sentence, by which, in a suit instituted for the recovery of an estate claimed by the party, judgment is given him, that he shall recover it, according to his claim. In a suit of this nature, when really adversary, the judgment, whether given after defence, or upon default, equally bound the right to the land. Of this, tenants in tail availed themselves, to deliver their estates from the entails to which they were subject. They permitted the entailed lands to be recovered against them, on a fictitious process, but, with a secret confidence, reposed in the recoveror, that, after the recovery was completed, he should reconvey the lands, to the party in fee simple; and in the mean time, permit him to take the profits of them. Another mode, by which the destruction of entails was allowed to be effected, was the application of the legal operation of *finés*. In the notion of our courts, a fine is a compromise, with the leave, and under the sanction of the court, of a real action, for the recovery of land. It is common to all courts of justice, to permit suits commenced in them, to be compromised, and to give their sanction to the compromise. In the civil law, and in the feudal law of other countries, this species of compromise, is termed a transaction. The process itself, therefore, we have in common with them. But, it is peculiar to our law, to use it as a mode of eluding the restraints imposed by the law of the land, on the alienation of real property. A writ is brought against the tenant in tail, by which the party suing out the writ, demands the lands, against the tenant, on his supposed previous agreement or covenant, to convey the land to him. The tenant is understood to be satisfied with the justice of the claim, and therefore applies for the licence of the court, to make the matter up. This is granted. The parties thereupon

enter into a concord or agreement. By this, the tenant acknowledges the lands to be the right of the demandant. This acknowledgment, being made with the leave, and under the sanction, and entered on the records, of the court, had the effect of a judgment. Of this process, tenants in tail availed themselves, to bar their estates tail, in the same manner they did of judgments: they procured a fictitious suit to be instituted against them, and settled it, by a fictitious compromise, in which they acknowledge the right to be in the demandant; with the same secret confidence reposed in him, that he should hold the estate in trust for them, and convey it according to their directions. Thus, through the medium of a collusive suit and judgment, which are now called a common recovery, in one instance, and of a collusive suit and compromise, which are now called a fine, in the other, entails were totally defeated. It is unnecessary, here, to trace the steps by which this has been effected. Common recoveries were originally a deceit upon courts of justice. When the sanction of the courts was first given them, it was done indirectly, with great caution, and some degree of artifice. It was not till the reign of Edward the 4th, that, they obtained the unequivocal sanction of a solemn decision of a court; and it was a much later period, before their effects were recognized by the legislature of the country. The introduction of fines, was effected in a much bolder manner. The statute *de donis* had said fines should be null; the statute of the 4. of Henry 7, or at least that of the 32. of Henry 8, said they should be valid. The different effects of a fine and a recovery do not fall within this enquiry. (Mr. Cruise's valuable treatises upon them are well known.) It seems sufficient to observe, generally, that, a fine is binding on the issue in tail only; a recovery is binding both on the issue and those claiming in reversion or remainder. A still more summary and easy opening of entails has been granted by the legislature, in favour of the creditors of traders, by the 21. Jac. 1. c. 19, whereby the commissioners are authorized to sell the bankrupt's intailed lands.

V. (9) The alienation hitherto spoken of, except that referred to in the last observation, has been confined to cases where it is the act of the party himself; and is, therefore, termed voluntary alienation. But, in many cases, it is produced by the act of law against the party's own will. In these cases, it is termed *INVOLUNTARY ALIENATION*. Here its effects must be considered, with respect to the party himself, his heir, and the special prerogative of the king. In every instance the genius of the feud appears. *With respect to the party himself*, the tendency of the feud to secure to the lord, the services of the tenant, and to take landed property from commerce, has been noticed. It was a consequence of those principles, that, the party was not at liberty to subject either himself, or his lands, to the payment of his debts. When, therefore, at the common law, a person sued a recognizance, or judgment for debt, or damages, he could neither take the body, nor the lands of the debtor, except in some special instances, into execution. He could only take in execution his goods and chattels, and the profits of his lands. For those the law gave him the *feri facias*, by which the sheriff was commanded to cause the sum, or debt recovered, to be made out of the goods and chattels of the debtor; and the *levari facias*, by which the sheriff was ordered to seize the debtor's goods, and receive the rents and profits of his lands, till the creditor was satisfied. Thus,

at the common law, neither the person nor the lands of the debtor, could be attached for debt. But, by the 25th Edw. 3d. c. 17, the body of the debtor was made liable, by a writ of *capias ad satisfaciendum*, to imprisonment, till the debt was satisfied; and the statute of Westminster 2. 13th Edw. 1st, ch. 18, granted the writ of *elegit*, by which the defendant's goods and chattels are delivered, to the creditor, at an appraised value; and, if these are not sufficient, then the moiety or one-half of the freehold lands of the debtor, are delivered to the creditor, to be retained till the debt is levied, or the debtor's interest in the land is expired. Afterwards, under the statute *de mercatoribus* 13 Edw. 1. the merchant might cause his debtor to appear before the mayor of London, or any of the other persons mentioned in the act, and there acknowledge his debt. This was called a recognizance. If the debt was not paid at the time appointed, the recognizance was held to be forfeited, and the body, lands, and goods of the debtor, were to be delivered to the merchant creditor, in execution, to compel payment of the debt. The process, by which this was done, was called an *extent*, because the sheriff was to cause them to be appraised, to their full or extended value, before he delivered them to the creditor. By the statute of the 27. Edw. 3d, c. 9. a similar process for the recovery of debts was provided for those, whose debts were acknowledged before the mayor of any of the towns, where the staple was held. These securities are generally known by the short appellation, of statutes merchant and statutes staple. From their nature, they were, at first, appropriated to the commercial part of the community. By the 23d Henry 8. a similar security, by a recognizance in the nature of a statute staple, was extended to the community at large. The laws, respecting bankrupts, seem now, to have made the landed property of merchants and other tradesmen, generally subject to their debts. The statutes respecting fraudulent conveyances and devices have proceeded, some way, towards making lands generally liable. It may not be improper to close this account of involuntary alienation by an account of involuntary alienation in the Roman law, as it is succinctly stated in the Digest, lib. 42. tit. 1. *Primo quidem res mobiles animales pignori capi jubent, mox distrabi; quarum pretium si suffecerit, bene est; si non suffecerit, etiam soli pignora capi jubent et distrabi. Quod si nulla moventia sint, a pignoribus soli initium faciunt. Quod si nec quæ soli sunt, sufficiant, vel nulla sint soli pignora, tunc pervenietur etiam ad jura. Si pignora quæ capta sunt, emptorem non invenient, rescriptum est ut addicantur ipsi cui quis condemnatus est. Addicantur autem ea quantitate qua debetur.*

With respect to the heir,—it has been observed, as one of the most striking peculiarities of the feudal system, that, the heir claimed nothing from the ancestor, but came in under the original feudal contract. The consequence was, that, originally, though on the decease of the debtor, the executor was answerable, as far as he had assets, the heir was not answerable in respect of the lands descended. But, after the free alienation of land was allowed, the attachment of it, in the hands of the heir, for the debt of his ancestor, followed as a necessary consequence. But, here again, the principle of the feudal law introduced a distinction, which, with some qualifications, prevails at this day; that, the assets in the hands of the executor, are liable generally to the ancestor's debts of every kind, but the assets in the hands of the heir, are liable only to debts of record, and debts by specialty, in which the heir is named; to the

former, in respect of the lien, which the process of the court created, on the lands themselves; to the latter, on the supposition, that the heir was comprehended in the original contract. For the ancestor's debts by simple contract, in opposition to the Roman law, and to the most obvious principles of natural justice, the heir still remains not liable. As to involuntary alienation, *in respect to the king*, it has been observed, that, in the case of a common person, the body of the debtor was not liable to execution; but, in the case of the king, it was different; for, at the common law, the body of the king's debtor is generally supposed to have been always liable to execution. Yet it seems singular, that, when the statute of *magna charta* restrained the king from seizing a man's land for debt, it should leave him at liberty to seize his person. In the course of time, however, it is certain, that, the body of the debtor might be seized, and that, after the law made it liable for the debts of the subject, the king had these special prerogatives, that, he could protect his debtor against the suits of his other creditors; and that, at the common law, he had a right to the custody of his debtor's person, in another prison, at the suit of the subject. By the common law also, all the goods and chattels of the king's debtor might be sold for the payment of his debts. But the most important of the prerogatives of the crown, at the common law was, that, in the king's case, execution issued, not only against the goods and chattels, but against the lands of the debtor. Another important prerogative was, in the case of rent, for which the king might distrain on any of the lands of the debtor. He had other important prerogatives, with respect to priority and preference in execution, and satisfaction of his debts, a minute investigation of which does not fall within the subject of this discussion. These extensive prerogatives have been considerably encreased by the statute law of the realm. By the 33d Henry 8, c. 39. all obligations made to the king, are to have the same force, and to be attended with the same remedies, to recover them, as a statute staple. By the 13 Eliz. c. 4. the lands of treasurers, receivers, and other accountants to the crown, were made liable to execution for debts to the crown, in the same manner, as if the party had acknowledged a recognizance, under the statute of Henry 8. A doubt arose, upon this statute, whether a sale might be made under it, after the death of the accountant or debtor. To remedy this, the explanatory statute of the 27th Eliz. c. 3. was past, by which a power of sale, after the death of the debtor, was expressly given. Afterwards, by an act made in the 39th year of queen Elizabeth, this explanatory act was repealed, and a new exposition was made of the statute of the 13th Eliz. with various new provisions. But the act of the 39th Eliz. being only temporary, and having expired early in the reign of James the 1st, the explanatory act of the 27th of Eliz. was revived; but it fell into disuse, and when it came to be examined, on occasion of the late exertions made for the recovery of the crown debts, it was found defective. This gave rise to the act of the 25th of his present majesty, c. 35. by which the court of exchequer is authorized, on the application of his majesty's attorney general, in a summary way, by motion, to order the estates of crown debtors, which should be extended by any writ of extent, or *diem clausit extremum*, to be sold for the payment of the debts. Thus the law appears to stand at present, on the involuntary alienation of land, with respect to the debts due to the crown.

V. (10) As to *TESTAMENTARY ALIENATION*; the influence of feudal principles, on this branch of alienation, is still strongly felt. It has been observed, that, by the Roman law, a will was an appointment of an heir; and he was considered, at the death of the testator, as universal successor to all the property, rights, and obligations, of the deceased. Testamentary alienation, like every other alienation, was prohibited by the genius and law of the feuds. By what steps it prevailed here, is so happily, and so concisely explained, in a note of the present Editor's most learned predecessor in this work, (note (1) to page 111. b.) as to render any deduction of it, unnecessary in this place. To a perusal of that note, the reader is therefore invited. It remains to observe, that, after the testamentary power over land, was introduced, *a devise of lands* was not considered, to operate as an appointment of a party to be a general heir of the testator, as in the Roman law; but, *was considered to operate as a legal conveyance of the lands themselves*. See lord Mansfield's argument in *Hogan v. Jackson*, Cowp. 299. In consequence of this, many of the requisites to other legal instruments are requisite in wills. Thus, as to the efficacy of a deed, for the transfer of real property, it is necessary, that the grantor should have the seizin of the lands conveyed; so, to the efficacy of a will, it is necessary, that, at the time of making his will, the devisor should have the seizin of the lands devised, or at least that kind of inchoate seizin or title, which is conferred by a contingent remainder. The consequence of which is, that, while a Roman will operates on all the property of the deceased, without any regard or distinction, as to property acquired by the testator, before, or after, the making of his will; by the law of England, a will cannot operate on any freehold lands, of which, at the time of making of the will, the party has not this species of seizin. Another consequence of the notion, that, a will affecting lands, is merely a species of conveyance, is, that, as by the law of England, a fee simple cannot be created without words of inheritance in the original donation or grant, so by the same law, *words of inheritance are equally necessary to the creation of a fee by will*. The only difference is, that, certain technical words are required by law, to the creation of an estate in fee, by deed; but in wills, they may be dispensed with, and supplied, by any words, sufficiently denoting the intention of the testator. Here the subject appears to draw to a conclusion.

V. (11) The reader has been presented with some of the most striking circumstances in the history and principles of the feudal law, particularly so far as they affect the landed property of this country. It remains only to state some of the most striking circumstances, *IN THE GENERAL HISTORY OF ITS DECLINE*. It has been shewn, that, the peculiar ingredient of the feud was, the connection between, and the reciprocal obligations of, the lord, and the tenant. Whatever interrupted or relaxed this connection and reciprocity of obligation, had a direct tendency to overturn the feud. One of the earliest circumstances of this tendency was, the *general prohibition of the practice of subinfeudation*. This, however salutary, in a general view, loosened the tie, which united the feudal association, by preventing the chain of dependence and subordination, consequent to the practice of subinfeudation; and which, it is evident from the general principles of the feudal law, and the history of other nations, operated, in the strongest manner,

to cement and perpetuate the feud. Another circumstance of the same tendency, was, the *introduction of the tenure of escuage*. This enabled the tenants by knights service to send persons to serve in the king's armies in their stead, and in process of time, to make a pecuniary satisfaction to the lord, in lieu of it. This substitution of money, for personal attendance, was diametrically opposite to every feudal principle. Accordingly all writers have considered it, as a degeneracy of the tenure of knight service. A further circumstance of the tendency we are speaking of, was *the prevalence of the socage tenure*. It is probable, that, the number of these tenures, was not great, till a considerable time after the Norman conquest; and perhaps the increase of them was not rapid, till some time after the introduction of escuage. From a comparative view of the different natures of the military and socage tenures, it is easily seen, how much stronger the feudal connection was under the former, than it was under the latter. The tenure in burgage was a species of socage tenure. Under this, chiefly, the commercial part of the community, classed themselves: Nothing could be more opposite to the nature of the feudal tenure, than the wealth, the independence, and the peaceful habits of life, which usually attend the pursuits of commerce. Thus, as the general tenure of socage prevailed, the connection between the lord and the tenant proportionally relaxed. But one of the most important circumstances, in the history of the decline of the feud, is the *introduction of uses*. By these the legal estate, of the land was in the feoffee. In fact, therefore, there never was a vacancy in the tenure. But the ownership and beneficial property of the land being absolutely vested in the *cestuy que use*, there was no point of connection, between him and the lord. Besides, when a feoffment was made to uses, it seldom happened, that, the feoffment was made to a single person. The feoffees were numerous, and when their number was reduced to that of one or two persons, a new feoffment was made to other feoffees, to the subsisting uses. In the mean time, the ownership of the land was transmitted and aliened, at the will of the *cestuy que use*. It is evident that, while the fief was held in this manner, there was a wide separation between the lord and the tenant. It must also be observed, that, where there was a feoffment to uses, the fruits of tenure incident to purchase, became seldom due, and those incident to descent almost never accrued to the lord. Now, where a person took by purchase, the lord was only entitled to the trifling acknowledgment of relief: when he came in by descent, the lord was entitled to the grand fruits of military tenure, wardship, and marriage. From these observations, it is clear, how great a fraud was practised upon the lord, by the introduction of uses. A fief thus circumstanced, presented an apparent tenant to the lord, but it was almost barren of every fruit and advantage of tenure, and the land itself was entirely subtracted from the feud. Hence we find, that, among the mischiefs recited in the preamble to the statute of uses, the loss to the lord, of the fruits of tenure, is particularly insisted on. It does not fall within the nature of these observations, to mention the steps which were taken to extirpate uses. One of them was the statute of the 1. Richard the 2d. c. 9. which gave an action to the disseizee, both against the feoffee, and the *cestuy que use*. It is observable, that, the *senatus consultum Trebonianum*, gave the same right of action against the *hæres fidei commissarius*. Unquestionably the object of the statute of the 27. of Henry 8. was to effect a

total

total extirpation of uses. But, as they were preserved, under the appellation of trusts, the emancipation was permitted to continue. While the relation between the lord and the tenant was great, this emancipation was a serious mischief. As the relation is now exceedingly small, it is, in this respect, scarcely felt. In the case of *Burgefs v. Wheate*, 1. Blackst. Rep. 123, lord Mansfield endeavoured to establish the right of the crown to the benefit of a trust, which failed for want of an heir, by attempting to fix on trusts, the feudal incident of an escheat. In the discussion of the question the analogy appeared unnatural, and the case was decided against the crown. A better ground in favour of the claim of the crown, might, perhaps, have been found, by resorting to its acknowledged prerogative, of being entitled to the *bona vacantia*, or every species of property, of which no owner is discoverable. At length it became evident to general observation, that, the principle of military tenure was gone; and that its incidents were more burthensome than advantageous, either to the lord, or the tenant, so that, all ranks of men seem to have desired its abolition. The legislature of England proceeded in it with the circumspection, which the magnitude of the object required. It was brought regularly before parliament, in the 18th year of king James the First, at his majesty's recommendation. In the 4th Inst. 203, lord Coke mentions this circumstance, and particularizes the outlines of the plan then in agitation. It bears a striking similitude to that, which was afterwards adopted. At length the 12. Cha. 2. c. 24. was passed; which enacts "That the court of wards and liveries, and all wardships, liveries, primer seizin, and ousterlemains, values, and forfeitures of marriages, by reason of any tenure of the king or others should be totally taken away: and that all fines for alienation, tenures by homage, knights service, and escuage, and also aids for marrying the daughter, of knighting the son, and all tenures of the king in capite, should be likewise taken away: and that, all sorts of tenures held of the king or others, should be turned into common socage; save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeantry."

It remains to make some mention of the writers, of whose assistance, the author in framing this note, has principally availed himself. Some of these, he has noticed in the course of the annotation; and to sir Henry Spelman, he must here repeat his acknowledgments. With respect to the other writers, to whom he is under obligations;—at the head of these, he must notice the feudal writers of his own country, particularly, sir William Blackstone, lord Kaimes, sir John Dalrymple, sir Martin Wright, doctor Robertson, and doctor Gilbert Stuart.—After these, he must acknowledge a general obligation to three foreign works, which in every part of the annotation, have been highly useful to him, the *Thesaurus Feudalis* of Jenichen, in three quarto volumes, published at Frankfort on the Main, in 1750: the *Historia Juris* of Struvius, in one quarto volume, published at Jena in 1728: and Voet's *Digressio de Feudis*, subjoined to his Commentary on the 38th book of the Pandects.—Under the first division of the annotation, he has been greatly assisted by Koch's *Tableau des Revolutions de l'Europe dans le Moyen Age*, 2 vols. octavo, Strasburgh, and Paris 1790; the early parts Pffell's *Abregé Chronologique de l'Histoire and du Droit Public d'Allemagne*, 2 vols. octavo, Paris, 1788; and in a particular manner,

manner, by D'Anvilles, *Etats formés en Europe, après la Chute de l'Empire Romain*, 1 vol. quarto, Paris, 1771. Under the 2d division, he is principally indebted to lord Stair's Institutions of the Law of Scotland, lib. 2. tit. 3. and to a dissertation of Lynkerus *de Feudo Pecuniario*, published in Jenichen's Collection, 3d vol. sect. 38th.—Under every part of the 3d division, he has particular obligations, to the *Selecta Feudalia* of Thomafius, octavo, published at Halle in 1728. In his account of the German codes, he has received great assistance from Brunquellus's *Historia Juris Romano-Germanici*, octavo, Amsterdam 1728, part 4; and Heinneccius's *Historia Juris*, lib. 2. His account of the capitularies is taken from these works, and from Baluzius's preface to his edition of the capitularies. His account of the customary law is taken from Fleury's *Histoire du Droit Francois*, and the article, Coutume, sent by Monsr. Henrion, to the French Encyclopedia. Mr. Gibbon, (3d vol. page 583, note 1) has, with his usual energy, thus mentioned and characterized four writers, the three last of whom, the editor has frequently had occasion to consult, under the 4th division; "In the space of thirty years, (1738—1765) this interesting subject, (the history of the invasion of Gaul,) has been agitated by the free spirit of the count de Boulainvillers (*Memoire historique sur l'Etat de la France*, particularly tom. 1. page 15. 40.); the learned ingenuity of l'abbé Dubos (*Histoire critique de l'Etablissement de la Monarchie Francaise dans les Gaules*, 2 vol. 4to); the comprehensive genius of the president de Montesquieu (*Esprit des Loix*, particularly l. 28. 30. 31); and the good sense and diligence of the Abbé de Mably (*Observations sur l'Histoire de France*, 2 vol. 12mo)." The last work, being considered as unfavourable to monarchy, was opposed, by a work entitled *Principes de Morale, de Politique, et de Droit Public, puisés dans l'Histoire de notre Monarchie, ou Discours sur l'Histoire de France, dédiés au Roi, par M. Moreau, Historiographe de France*. A Paris, de l'imprimerie royale, 1777, 24 vol. 8vo.—Under this head, he has also received great assistance on the subject of the history of France, from the president Henault, and from the *Theorie des Matieres Feodales et Censuelles*, par Monsr. Hervé, 5 vol. 8vo. Paris, 1785:—For what he has said, respecting the feudal history of Germany, he is chiefly indebted to Mr. Dornford's excellent translation of Professor Piitter's *Historical Development of the present Constitution of the Germanic Empire*, and Struvius's *Elementa Juris Feudalis*, Jena, 8vo. 1745.—In his account of the substitutions of the civil law, he found, what is said on these subjects, in the *Prælectiones* of Huberus, 3 vol. 8vo. *Trajecti ad Rhenum*, particularly useful.—The little he has said on the Spanish fiefs, he has taken from Molina *de Hispaniorum Primogeniis*, fol. Coloniae, 1601: and Zoefius's, *Juris Feudalis analytica Expositio*, 8vo. Lovanii 1663. He might perhaps have said something more satisfactory on this head, had he been able to procure, Girardus Ernestus *de Frankinau's Sacrae Themidis Hispaniae Arcana*, Hanover, 1704.—In a few instances, he has taken, what he hopes will be thought, a pardonable liberty, of inserting, in the present annotation, some passages, from his notes, to the subsequent part of the work. These, however, will be found preserved in their original situation.

